

LAW OFFICES

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REPORT ON RECENT ETS
AND IAQ DEVELOPMENTS

July 23, 1993

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

[1] EPA Administrator Testifies at Subcommittee Hearing on ETS Risk Assessment

On July 21, 1993, at a time scheduled to coincide with a subcommittee hearing at which testimony critical of the EPA Risk Assessment on ETS was heard, Representative Henry Waxman (D-Cal.), scheduled a hearing before a House subcommittee on health and the environment, which he chairs. Among those testifying at the Waxman hearing were EPA Administrator Carol Browner, Dr. Morton Lippmann and representatives of the American Lung Association.

At the hearing Waxman said he planned to introduce legislation to banish smoking from all buildings open to the public except in designated, separately ventilated smoking rooms.

During her testimony, Administrator Browner defended the EPA Risk Assessment on ETS and summarized its conclusions before announcing the release of a new brochure, titled *What You Can Do About Secondhand Smoke*. A copy of the brochure is attached as Appendix B. The brochure recommends (i) that people not smoke in their homes or permit others to do so; (ii) that all facilities serving children have a smoking policy to protect children from ETS exposure; and (iii) that every company have a smoking policy to protect nonsmokers from ETS exposure in the workplace. Browner asserted that simple separation of smokers and nonsmokers is not adequate to eliminate nonsmoker exposure to ETS, and she claimed that banning smoking will be the least costly way to eliminate the purported risks associated with ETS exposure.

According to Browner, the agency's workplace smoking policy guide will be published later in the

year. She concluded her prepared remarks by stating, "EPA believes that exposure to environmental tobacco smoke provides sufficient risk to recommend preventing involuntary exposure in all indoor environments."

Dr. Morton Lippmann also defended the risk assessment in testimony at the Waxman hearing. Dr. Lippmann chaired the EPA Science Advisory Board committee that reviewed the risk assessment. He detailed the methodology used by the EPA in reaching its conclusion that ETS is a Group A carcinogen. Appendix C contains copies of the statements of Administrator Browner and Dr. Lippmann.

As the Waxman hearing was proceeding, Representative Charles Rose (D-N.C.), Chair of the House Agriculture Committee's Subcommittee on Specialty Crops and Natural Resources, also held a subcommittee hearing concerning the risk assessment. Among those appearing at the hearing or submitting statements to the subcommittee were Maurice LeVois, Ph.D., former Director of the Veterans Administration's Agent Orange Research and Education program, and Dr. Gio Gori, former director of the Smoking and Health Program at the National Cancer Institute.

LeVois stated that the risk assessment was "contrary to accepted statistical methodology" and warned the subcommittee that "EPA's ETS risk assessment should not be relied upon as an unbiased estimate of the risk of ETS exposure because it exploits flawed data and employs biased, unscientific methods."

Gori expressed his concern about "what the Agency staff acknowledges was 'fancy statistical footwork.'" He observed that the EPA "doubled the statistical 'confidence interval' from the standard five percent margin usually posted — and employed in the early drafts of the EPA report — to a 10 percent margin." He warned the subcommittee that "scientists who reviewed the EPA report disagree privately with its conclusions, even though they feel the need to agree in public with an agency that influences much of the research funds they obtain. Many of these scientists have strong ties to militant anti-smoking organizations."

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Also appearing at the Rose hearing was William Farland, director of EPA's Office of Health and Environmental Assessment. A copy of his statement, which includes a response to tobacco industry criticisms of the risk assessment, is attached as Appendix D.

[2] ETS Risk Assessment Litigation: Defendants Move to Dismiss Complaint

In a motion to dismiss the lawsuit challenging the validity of the EPA Risk Assessment on ETS, the EPA and its Administrator, Carol Browner, avoided the merits and argued for dismissal on largely procedural grounds. The motion contends that the court has no jurisdiction over the subject matter of the action and that plaintiffs failed to state a claim upon which relief can be granted.

EPA's lack-of-jurisdiction claim is based on three arguments. First, EPA maintains that neither the risk assessment nor the classification of ETS as a carcinogen is an agency action under the Administrative Procedure Act, which prescribes the scope of judicial review of agency actions. The statute precludes review of EPA's actions relating to the risk assessment, the agency argues. Second, EPA asserts, even if the risk assessment or the carcinogen classification were an agency action, neither is a "final" agency action reviewable under the APA. And third, according to EPA, neither the APA nor the due process claims raised by plaintiffs are "ripe for review" by the courts.

EPA's contention that the tobacco industry plaintiffs failed to state a claim focuses on the industry's charge that the risk assessment and the classification of ETS as a Group A Carcinogen unlawfully deprived them of a constitutionally-protected property interest without due process. EPA argues that property of the tobacco industry was not rendered "illegal or valueless" by the agency's actions, and, in any event, "EPA's responsibility to protect public health and to inform the public of threats to public health plainly outweigh the injuries alleged by plaintiffs."

The motion to dismiss was made public on July 21, 1993, in conjunction with Administrator Browner's testimony concerning ETS to a Congressional subcommittee. See item 1 of this Report.

The complaint in the case, filed in June 1993, charges EPA with exceeding its statutory authority in conduct-

ing the risk assessment, using faulty science and improper scientific conclusions in classifying ETS as a Group A carcinogen, failing to follow its own risk assessment guidelines, and violating the guarantee of due process of law in the Fifth Amendment to the U.S. Constitution. The six plaintiffs consist of three organizations related to tobacco growers, two cigarette manufacturers, and one cigarette vending machine operator. *Flue-cured Tobacco Cooperative Stabilization Corporation, et al. v EPA*, No. 6:93CV370 (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

[3] Congressman Responds to Colleague's Criticism of EPA Risk Assessment

In a July 5, 1993, letter to the editor of *Roll Call*, Representative Richard Durbin (D-Ill.), principal sponsor of the pending PRO-KIDS legislation (H.R. 710), responds to the Guest Observer article written by his colleague, Representative James Clyburn (D-S.C.), in May 1993. For a summary of the Clyburn article, see issue 49 of this Report, June 11, 1993.

Durbin repeats the EPA's findings that ETS is a "Group A carcinogen" and compares it to asbestos, benzene and arsenic. Durbin summarizes his PRO-KIDS legislation and asserts that the bill "is vital to protecting the health of both children and federal workers."

The letter criticizes Clyburn's suggestions about ventilation, claiming that they are ineffective and/or too costly, and concludes with the following: "The simplest, most effective, and most economic way to protect nonsmokers from tobacco smoke is to make the workplace smoke-free." See *Roll Call*, July 5, 1993.

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[4] *ASH v. OSHA*: Both Sides File Motions to Govern Further Proceedings

On July 19, 1993, ASH and the Department of Labor filed separate motions in response to the Court of Appeals' May 1993 order granting ASH's request to hold the case in abeyance and directing the parties to file motions to govern further proceedings within 60 days. For further details about the May 1993 order entered by the panel assigned to the case (Mikva, CJ;

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Wald, J; and Ginsberg, J), *see* issue 48 of this Report, May 28, 1993.

In brief, ASH seeks the establishment of an immediate briefing and argument schedule, and the Department seeks a continuation of the order holding the case in abeyance. The Department states that the Secretary of Labor has not yet made a decision about regulating ETS and cannot say "when he will decide whether or how to regulate occupational exposure to tobacco smoke." The Department also requests an order requiring the Secretary to file status reports with the court.

The motion filed by ASH is a request to proceed with briefing and oral argument "at the earliest possible opportunity." Stating that "OSHA has not provided ASH with any indication that it plans to remedy its failure [to initiate rulemaking proceedings to regulate ETS in the workplace] by today's Court deadline," ASH continues to characterize OSHA's inaction as an unlawful and unreasonable delay in regulating ETS. ASH reminds the court that it has been six years since ASH filed its first petition seeking the regulation of ETS by OSHA.

ASH cites a number of studies, including the study of ETS done by the EPA, to bolster its argument regarding the purported threat to worker health posed by ETS exposure in the workplace. ASH states that this lawsuit principally seeks "the initiation of the regulatory process by the publication of a notice of a proposed rulemaking for environmental tobacco smoke, as a known carcinogen, in a separate rulemaking proceeding apart from other indoor air pollutants."

ASH admits that it is ultimately seeking a workplace smoking ban. Accordingly, it also requests that the court retain jurisdiction over the case even after rulemaking is commenced "to assure that OSHA does not continue its unlawful and unreasonable delays in promulgating a final, permanent regulation banning tobacco smoke in the workplace."

The Department of Labor motion requests a continuation of the order holding the case in abeyance inasmuch as "[t]he Secretary still has not determined whether or how to regulate occupational exposure to tobacco smoke." The Department argues that the litigation will be unnecessary if the Department decides to regulate occupational exposure to ETS, and thus, "[i]t would not be an efficient use of either the Court's

or the government's resources to require briefing and argument directed at the Secretary's decision not to address cancer hazards of tobacco smoke separate from other hazards, when all parties recognize that a subsequent regulatory decision may well overtake that litigation."

According to the motion filed by the Department, the Secretary is "prepared to file status reports to inform the Court of the progress of this matter." The Department requests, therefore, that the court direct the filing of an initial status report in 90 days. *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992).

[5] OSHA Clarifies Permissible Exposure Limits for Indoor Air Toxins in Wake of Court Decision Overturning 1989 Standard

OSHA has apparently decided that it may enforce some of the new permissible exposure limits (PELs) which were overturned by a court of appeals in *AFL-CIO v. OSHA* (U.S. Court of Appeals, Eleventh Circuit) (decided July 7, 1992). The standards covered some 428 substances. Apparently OSHA will enforce, under the general duty clause of the Occupational Safety and Health Act, those standards which have become "industry standards." According to officials with the Chemical Manufacturers Association, OSHA's clarification, which appeared in a notice in the June 30, 1993, *Federal Register*, provides little guidance to employers about which PELs will be enforced. *See Occupational Health & Safety News*, July 9, 1993.

[6] House and Senate Hold Hearings on Reform Legislation

Hearings were held on July 14, 1993, before committees of the House and Senate to consider testimony relating to OSHA reform legislation (H.R. 1280; S. 575). According to press reports, most of the testimony in both chambers focused on the controversial measure that would require employers with 11 or more employees to establish labor-management safety and health committees.

Dr. J. Donald Millar, head of NIOSH, testifying before the Senate Committee on Labor and Human Resources, stated that "a great many chronic illnesses that can be caused by exposures to chemicals and agents at work, such as asthma or cancers, are rarely recognized as occupational." He also observed that physicians may not

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attribute a patient's illness to a workplace exposure that occurred 10 to 20 years in the past.

In the House, before which Representative William Ford's bill is pending, the hearing was held before the Occupational Health and Safety Subcommittee of the Committee on Education and Labor Standards. An additional hearing was scheduled for July 21, 1993, before the House subcommittee. See *Daily Report for Executives*, July 15, 1993; *States News Service*, July 14, 1993; *Canada NewsWire*, July 13, 1993.

STATE AND LOCAL GOVERNMENTS

[7] ETS-Related State and Local Legislation

•California

On July 14, 1993, A.B. 13 reportedly was approved by the Senate Health and Human Services Committee by a 7 to 1 vote. The bill originally would have prohibited smoking in all indoor workplaces, but the bill's sponsor has agreed to allow smoking in bars, convention centers, large warehouses, card rooms, bingo centers, hotel lobbies and hotel bars not connected to restaurants. A.B. 13 must now pass two more Senate committees and then votes in the Senate and Assembly. A.B. 13's rival, A.B. 996, has been heard in committee, but no vote was taken to allow the bill's sponsor to work on amendments. The sponsor hopes to line up votes in preparation for the Legislature's return in August. See *The San Francisco Chronicle*, *The Los Angeles Times*, and *Sacramento Bee*, July 15, 1993.

•Connecticut

On July 2, 1993, Governor Lowell P. Weicker, Jr. (ACP) signed a bill that restricts smoking to designated areas in any government building or portion of a building owned or leased by the State. The bill also prohibits smoking in all public elementary and high schools and in any place where the public conducts business. See H.B. 5275, Regular Session (1993) and *Daily Labor Report*, July 15, 1993.

•Local Governments in Maryland

Baltimore Councilman C. Vernon Gray has introduced another smoking restriction bill nearly identical to one vetoed by the County Executive on June 18, 1993. The County Executive had told the council he would have signed the previous bill if a smokers' rights clause and a bar and tavern exemption were removed. The

new bill retains the bar and tavern exemption; however, it deletes the smokers' rights clause. The County Executive has said that he will veto the new bill as well unless the bar and tavern exemption is deleted. According to news reports, there is little inclination among council members to delete the exemption, despite restaurant owners' protests that the bill puts them at a competitive disadvantage with bars and taverns. Owners of local bowling lanes have requested to be exempted also. The council is scheduled to vote on the bill July 22, 1993. See *The Baltimore Sun*, July 6, 1993.

•Nebraska

According to a press report, a general ban on smoking which went into effect on July 6, 1993, will moot a lawsuit filed by Missoula County jail inmates who claimed bias due to a smoking policy which permitted guards to smoke but banned smoking among prisoners. The inmates were reportedly seeking \$33 million in damages. See *USA Today*, July 6, 1993.

•New York

According to a press report, state lawmakers in New York adjourned for the summer without passing a bill that would have banned smoking in schools. The matter will carry over, however, and legislators may consider the measure when they return to the capitol in the fall. See *Gannett News Service*, July 8, 1993.

•Puerto Rico

On July 15, 1993, the House of Representatives reportedly approved a ban on smoking in restaurants, grocery stores, schools, theaters and public transport. The measure, which was approved by a unanimous vote, has also been approved by the Senate and has the support of Governor Pedro Rossello. A bicameral committee will evidently have to determine what fines to impose for violations of the statute as the House and Senate versions of the measure differed on this issue. Puerto Rico was once a major tobacco producer until there was shift from agricultural to industrial development in the 1950s. See *Associated Press*, July 16, 1993.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[8] *Butler*: Discovery Continues

On July 19, 1993, plaintiffs took a videotaped deposition of plaintiff Burl Butler to preserve his

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testimony. The deposition was brief, lasting less than thirty minutes. Defendants did not cross-examine Mr. Butler. Defendants have noticed the continuation of the deposition of plaintiff Ava Dean Butler, Burl Butler's wife, for August 3.

Plaintiffs contend that Burl Butler, a barber from Laurel, Mississippi, developed lung cancer as a result of his exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

[9] **Voth: Plaintiff Files Motion to Recuse**

Plaintiff has filed a motion to recuse U.S. District Judge Robert Jones due to the judge's purported bias against plaintiff. Until the motion to recuse is decided, all other matters have been stayed. Matters pending before the court include Brown & Williamson's motion to dismiss the complaint based on failure to state a claim and plaintiff's motion for leave to amend his complaint.

Frank Voth, who is incarcerated in the Oregon State Penitentiary, alleges that his civil rights have been violated as a result of his exposure to ETS. He claims that he has "incurred permanent health damage and is at risk of death" as a result of ETS exposure. Defendants in *Voth* are purported to be Forsyth Tobacco Products, R.J. Reynolds and Brown & Williamson. *Voth v. Forsyth Tobacco Products, et al.* (U.S. District Court, Oregon) (filed April 27, 1993).

ETS/IAQ LITIGATION NOT INVOLVING
CIGARETTE MANUFACTURERS

WORKPLACE: WORKERS' COMPENSATION

- [10] **Employer: New York City Department of Health,**
1993 WL 257343 (New York Workers' Compensation Board) (decided June 22, 1993)

The workers' compensation board has upheld the claim of a Health Department employee who alleged that his respiratory problems were caused by activities and reductions in ventilation related to an office

renovation project. The renovation took place during work hours and filled the air with dust and noxious fumes from paint. Following renovation, the claimant's desk was located away from any air vents and between a high speed printer copier and a photo copier. Although testing conducted by the City did not show any indoor air conditions that would have precipitated acute illness, the board found that the claimant had workplace related allergic rhinitis, bronchitis and upper respiratory condition.

WORKPLACE: CLEAN INDOOR AIR ACT

- [11] **Smith v. Martin,** 1993 U.S. Dist. LEXIS 8873
(U.S. District Court, Northern District, Illinois, Eastern Division) (decided June 28, 1993)

A senior district court judge has denied in part and granted in part the summary judgment motion filed by the defendants in this case, in which a Chicago police detective claims that his First Amendment right to free speech was violated when he was punished for speaking out about being exposed to ETS in the workplace. For additional discussion of the case, see issue 34 of this Report, November 6, 1992.

The defendants, fellow members of the Chicago Police Department, had sought summary judgment on the ground of qualified immunity, arguing that they were immune from suit because it was not clear in June 1991 that the point of Smith's speech was to deal with matters of public concern, rather than solely to improve his personal working conditions. The court held that the nature of the employee's speech is inadequate to insulate officials from a § 1983 action.

The court did grant the motion as to former Superintendent of Police Leroy Martin and Lieutenant John Klein, finding that each had limited information about Smith's grievance and thus could not have violated Smith's constitutional rights by responding as they did to the information they had at the time. The court cites the U.S. Supreme Court decision in *Helling v. McKinney*, 1993 U.S. LEXIS 4210 (June 18, 1993), to note "parenthetically" that the U.S. Supreme Court has upheld a § 1983 complaint by a prison inmate that his Eighth Amendment rights were violated by involuntary exposure to ETS.

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LEGAL ISSUES AND DEVELOPMENTS

- [12] "Ban Smoking in Fast-Food Restaurant, Texas Official Says," B. Scharrer, *Gannett News Service*, July 9, 1993

This article discusses the measures that Texas Attorney General Dan Morales has been taking to ban smoking in all fast food restaurants in the state. According to the author, the EPA Risk Assessment on ETS prompted Morales to investigate smoking policies at fast food chains and consumer complaints about such policies.

In May 1993, Morales apparently issued civil investigative demands, which are similar to subpoenas, to 15 major fast food chains. Whataburger was the only chain refusing to cooperate. For information about a lawsuit Morales filed against Whataburger to force the company to answer the questions posed in the demands, see issue 47 of this Report, May 14, 1993.

El Paso Restaurant Association president Gary Hoff reportedly opposes the attorney general's campaign and stated that some 60 percent of the revenue for El Paso restaurants comes from smokers, especially in combination restaurant-bars. The article concludes by reporting that Morales will meet with representatives of the fast food industry in late July or early August 1993 to negotiate a plan. A spokesperson for Morales indicated that Morales expects the industry to cooperate.

- [13] "Wheelchairs at Third Base; Americans With Disabilities Act of 1990," L.H. Rockwell, Jr., *National Review*, June 7, 1993

This article discusses the Americans with Disabilities Act (ADA) and observes that the National Council on Disability has recommended that the government should serve those with "emerging disabilities," including those claiming to be adversely affected by exposure to ETS. The author of the article is critical of the ADA and believes that business will be hampered by the litigation the Act will spawn and the growth in government that is required to implement and police it.

OTHER DEVELOPMENTS

- [14] Union Ratifies Agreement that Requires Smoke-free Workplace

Paperworkers Locals 47 and 65 have reportedly ratified a three-year agreement with Proctor & Gamble Paper Products in Green Bay, Wisconsin, that will require a smoke-free workplace by January 1, 1994. The agreement also apparently permits the testing of current employees for drug or alcohol use. See *Daily Labor Report*, July 9, 1993.

- [15] Workplace Smoking Policies Subject of Glantz Study

According to a press report, anti-smoking activist Stanton Glantz has published the results of a survey about the effects of workplace smoking bans on tobacco consumption. Some 24,000 adults were surveyed by telephone between July 1990 and February 1991. Glantz claims that of those surveyed who worked in businesses with nonsmoking policies, only 14 percent were regular smokers off the job and they used, on average, 45 fewer packs of cigarettes annually than smokers whose employers have not adopted smoking bans. According to Glantz, the smoking rate among those employed in businesses without such rules is 21 percent. He has calculated that a uniform ban on smoking would cut cigarette consumption by 41 percent. Glantz's report has been published in the journal *Archives of Internal Medicine*. See *The San Francisco Chronicle*, July 16, 1993.

- [16] Risk Assessment Provides Impetus for School Smoking Ban

The Board of Trustees of the Santa Ana Unified School District has reportedly approved a ban on smoking on all property belonging to the district. An employee committee apparently recommended the ban in light of the EPA Risk Assessment on ETS. Approved by a 3-2 vote, the new smoking policy provides for a ban in all district buildings with closed ventilation systems beginning September 1, 1993, and a ban on all district property and for all events sponsored by the district on January 1, 1994. Trustees opposing the ban reportedly did so because they believed the prohibition restricts people's freedom. See *Los Angeles Times*, July 16, 1993.

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